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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D., 1948

No. 113

BATH MILLS, INC.,

Petitioner,

vs.

THEODORE ODOM,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable the Supreme Court of the United States
Your Petitioner Respectfully Show:

Summary and Short Statement of the Matter Involved

This action was removed to the District Court of the United States for the Eastern District of South Carolina, Aiken Division, because the amount in controversy exceeds Three Thousand Dollars and the defendant is a non-resident of South Carolina. The Complaint (R. pp. 3-7) presents a typical tort case, for personal injury to plaintiff (the

respondent herein) who was an employee of the defendant (the petitioner herein).

The matter involved, at this juncture, arises out of the fact (R. p. 9) that the South Carolina Workmen's Compensation Act is optional in character, and that the petitioner had availed itself, by giving timely notice, of its right to elect not to operate under it and to have its provision not apply to it and its employees, but to have claims against it tried in the Courts. The Act, however, provides (Sec. 15 of Act, Sec. 7035-17 of South Carolina Code of 1942 set out in full at p. 9 of the record) that an employer who elects not to operate under the Act, shall not "be permitted to defend any suit at law upon any or all of the following grounds:

> "(a) That the employee was negligent.
>
> "(b) That the injury was caused by the negligence of a fellow employee.
>
> "(c) That the employee has assumed the risk of the injury."

The defendant in the District Court, now the petitioner, contended that under the decisions of the Supreme Court of South Carolina there is a vast difference between negligence on the one hand and recklessness, willfulness and wantonness on the other hand and between contributory negligence on the one hand and contributory recklessness, willfulness and wantonness on the other hand, and that as matter of proper statutory construction under the decisions of the Supreme Court of South Carolina that when, as to the matter of negligence, the South Carolina Act in derogation of common law deprives the employer only of the defense of contributory negligence, that it does not deprive him of the separate and distinct defense of contributory recklessness, wantonness or willfulness, hence, in its answer (R. pp. 7-8) the petitioner, then the defendant, set

up for a first defense a virtual general denial, and for a second defense alleged that the plaintiff (now the respondent) was guilty, on the occasion in question of contributory recklessness and wantonness and therefore could not recover.

The main question now involved is whether under an optional Workmen's Compensation Act (such as exists in South Carolina) which deprives an employer, who elects not to operate under it, of the defense of contributory negligence, such employer is also deprived of the defense of contributory recklessness and contributory wantonness and contributory willfulness; or whether to the contrary, the decisions of the Supreme Court of South Carolina do not establish the fact that negligence and contributory negligence are different and distinct legal doctrines from recklessness, willfulness and wantonness and contributory recklessness, contributory wantonness and contributory willfulness, as is hereinafter set out, and whether under the decisions of the South Carolina Courts the rule of *expressio unius est exclusio alterius,* does not govern this case. The petitioner also contends that to construe the statute in question as depriving it of the defenses of contributory recklessness and contributory wantonness would constitute the taking of defendant's property without due process of law in violation of due process clauses of the Constitution of the United States.

The respondent (then the plaintiff) moved to strike the second defense, the purpose of which has just been stated, from the answer. The District Judge granted the motion (R. pp. 10-13). The case was tried in the District Court, resulting in a verdict of $5,000.00 in favor of respondent. Judgment was duly entered and the case was appealed to the Circuit Court of Appeals for the Fourth Circuit which Court affirmed the judgment in an opinion which is set out at pages 18-21 of the Transcript of Record.

The baleful effect of the ruling of the District Court striking bodily from the answer, the petitioner's second defense of contributory recklessness and contributory wantonness is officially described in the Stipulation of the Counsel set out in the Transcript of Record on pages 8-10 as follows:

> "The case then went to trial and was tried throughout subject to and in accordance with the aforesaid ruling of the Court, and upon the theory and basis and with the effect of the Defendant not being permitted to defend the suit on the grounds of contributory negligence, recklessness and wantonness."

Jurisdictional Statement

The jurisdiction of this Court is invoked under section 240(a) of the Judicial Code (28 U. S. C. 347). The decision was rendered in this case by the United States Circuit Court of Appeals on April 29, 1948 and judgment was entered on the same day (R. 21). The sending down of the mandate was stayed by order dated May 13, 1948, provided an application for a writ of certiorari was filed within thirty days from said date (R. 21). A subsequent order dated May 29, 1948 was granted staying the sending down of the mandate provided the application therefor was filed in the Supreme Court within thirty days from that date. The Petition and application for a writ of certiorari and the supporting brief was filed in the office of the Clerk of Court of the Supreme Court of the United States before June 29, 1948.

The Questions Presented

The questions presented are,—

Point A

Whether the optional South Carolina Workmen's Compensation Act, which deprives an employer, who exercises his option and elects, as he has a perfect right to do to have

any cases against him tried in the Courts, of the defense of contributory negligence also deprives him of the defense of contributory recklessness and contributory wantonness and contributory willfulness.

POINT B

Whether to construe the provisions of the Act in question as depriving the employer of defenses not mentioned in the Act, with the resultant verdict and judgment herein and its threatened collection would not constitute the taking of petitioner's property without due process of law in violation of the due process clauses of the Constitution of the United States.

POINT C

Incidentally, the effect of the Stipulation of Counsel hereinbefore quoted, which was a solemn and sedate agreement between counsel, which agreement squares with the self-evident facts that the case was tried throughout subject to the ruling of the Court which bodily struck from the answer the defense referred to herein, and that the case was tried throughout upon the theory and basis and with the effect of the defendant (now the petitioner) not being permitted to defend the suit on the ground of contributory negligence, recklessness and wantonness.

Reasons Relied On for the Allowance of the Writ

POINT 1

We submit that the writ of certiorari sought herein should be granted under the provisions of Rule 38 of the Supreme Court because, we submit, the Circuit Court of Appeals herein has decided an important question of local law in a way probably, (and in fact), in conflict with the applicable local decisions, and has failed to decide the

question of Federal and Constitutional Law presented by the record, which federal and constitutional question should be decided by the Supreme Court, and has, incidentally, so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of the Court's power of supervision.

It is submitted that the decision of the Circuit Court of Appeals herein is contrary to the following decisions of the Supreme Court of South Carolina which are referred to in the supporting brief hereto attached as to the distinction between negligence and contributory negligence and contributory recklessness, wantonness and willfulness, namely:

Pickens v. *South Carolina & Georgia Railroad Company*, 54 S. C. 498: 32 S. E. 567;
Bailey v. *Smith*, 132 S. C. 212: 128 S. E. 423;
Humphries v. *Railway Company*, 90 S. C. 442: 73 S. E. 870;
Lawson v. *Railway*, 91 S. C. 201: 74 S. E. 481;
Gossett v. *Telegraph Company*, 95 S. C. 397: 79 S. E. 309;
Glenn v. *Railway Company*, 145 S. C. 41: 142 S. E. 801;
Spillers v. *Griffin*, 109 S. C. 78; 95 S. E. 133;
Chisolm v. *Railway*, 121 S. C. 394: 114 S. E. 845;
Colt v. *Britt*, 129 S. C. 226: 123 S. E. 845;
Osteen v. *Railway*, 119 S. C. 438: 112 S. E. 352;
Horne v. *A. C. L.*, 177 S. C. 461: 181 S. E. 642;
Nuckolls v. *Great Atlantic Tea Company*, 192 S. C. 156: 5 S. E. (2nd) 862;
Caughman v. *Y. M. C. A.* (Decided May 15, 1948).

It is further submitted that the decision of the Circuit Court of Appeals is contrary to following decisions of the Supreme Court of South Carolina, as to the proper statutory construction of the statute which deprives the em-

ployer, as to negligence, only of the defense of contributory negligence which decisions are likewise referred to in the supporting brief, namely:

Beaty v. *Richardson*, 56 S. C. 173: 34 S. E. 73;
Clegg v. *City of Spartanburg*, 132 S. C. 182: 128 S. E. 96;
Powell v. *Greenwood County*, 189 S. C. 463: 1 S. E. (2nd) 624.

POINT 2

It is submitted that the constitutional point raised to the effect that to construe the provisions of Section 15 of the South Carolina Workmen's Compensation Act as depriving the employer in question of defenses not mentioned or referred to therein with the resultant verdict and judgment and its collection would constitute the taking of petitioner's (defendant's) property without due process of law in violation of the due process clauses of the Constitution of the United States, constitutes an important question of Federal Law which has not been, but should be settled by the United States Supreme Court.

POINT 3

It is submitted that counsel having entered into a solemn stipulation and agreement, which definitely squares with the self-evident facts which are incidentally involved, that the case was tried throughout subject to and in accordance with the rulings of the District Court which bodily struck from the record the defenses of contributory recklessness and contributory wantonness and that the case was tried throughout "upon the theory and basis and with the effect of the defendant not being permitted to defend the suit on the grounds of contributory recklessness, contributory negligence and contributory willfulness"; that the Circuit Court of Appeals should have granted full force and effect to said stipulation and should not have endeavored to pass

on the question involved merely from the pleadings and undisclosed "statements at the Bar of the Court."

Wherefore, your Petitioner-Appellant prays that a writ of certiorari be issued under the seal of this Court directed to the Circuit Court of Appeals of the Fourth Circuit directing said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings in said Court in the case numbered 5711, Bath Mills, Inc., Appellant against Theodore Odom, Appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the Statutes of the United States; and that the judgment herein of said Circuit Court of Appeals for the Fourth Circuit be reversed by the Court, and for such further relief as this Court may see proper.

P. F. HENDERSON,
HENDERSON & SALLEY,
Counsel for Petitioner.

Aiken, South Carolina,
June 17th, 1948.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1948

No. 113

BATH MILLS, INC., *Petitioner and Appellant*

versus

THEODORE ODOM, *Appellee and Respondent*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

General Statement

In the foregoing petition, we have fully stated the case and have stated that the jurisdiction of the Supreme Court is invoked under Section 240(a) of the Judicial Code (28 U. S. C. A. 347-a). The opinion of the Circuit Court of Appeals is printed in full in the Record (pp. 18-21). In the petition we have stated that we contend that the Writ of Certiorari should be granted because the Circuit Court of Appeals (a) has decided an important question of local law in a way probably in conflict with applicable local decisions, (b) has failed to decide a federal question which has not been, but should be settled by the Court, and (c) has inci-

dentally, so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Specifications of Errors

The Circuit Court of Appeals for the Fourth Circuit erred it is respectfully submitted in holding:

Point A

That the Workmen's Compensation Act of the State of South Carolina deprives an employer who elects to have claims on the part of his employee adjudicated in the Courts, of the defenses of contributory recklessness, contributory wantonness and contributory willfulness; it being submitted that the decision of said Court is contrary to the local decisions of the Supreme Court of South Carolina upon the subject involved.

Point B

That to construe the provisions of the Workmen's Compensation Act in question as depriving the employee of the defenses not mentioned in the Act, with the resultant verdict and judgment rendered herein and its threatened collection constitutes the taking of appellant's property without due process of law and constitutes a violation of the due process clauses of the Constitution of the United States.

Point C

That the Circuit Court of Appeals erred, if it intended to so rule, in not giving the appellant the benefit of the stipulation of counsel to the effect that the case was tried throughout subject to the ruling of the District Court which bodily struck from the answer the defense of contributory recklessness and contributory wantonness and that the case was tried throughout upon the theory and basis and with the

effect of the defendant (appellant) not being permitted to defend the suit on the grounds of contributory recklessness and contributory wantonness.

ARGUMENT

Point A

The Circuit Court of Appeals erred, we respectfully submit, in sustaining the ruling of the District Court in striking from the answer, Appellant's defense of Contributory Recklessness and Wantonness and thereby, as counsel agreed in their stipulations, as a fact depriving Appellant throughout the trial of that defense.

We submit in the words of Rule 38 of the Supreme Court that the Circuit Court of Appeals "has decided an important question of local law in a way probably in conflict with applicable local decisions," which local decisions by the Supreme Court of South Carolina we now ask to present, after which we will endeavor to reply, seriatim, to the various postulates embodied in the brief decision of the Circuit Court of Appeals.

The Sharp Distinction Between Contributory Negligence and Contributory Recklessness, Wantonness and Wilfulness.

The marked difference between negligence on the one hand and willfulness (which includes and is in fact the same thing as recklessness and wantonness) on the other hand and between contributory negligence on the one hand and contributory willfullness (which includes and is in fact the same thing as contributory recklessness and contributory wantonness) has long been recognized, applied and enforced by the Supreme Court of South Carolina. It may be profitable to trace the history, and to note the wide

difference established by that Court between the opposing elements.

We may quite properly start with the somewhat famous *Pickens* case *(Pickens* v. *South Carolina and Georgia Railroad Co.,* 54 S. C. 498; 32 S. E. 567). Therein Mrs. Pickens, wife of South Carolina's Governor during the war of 1861-5, bought a round trip ticket from Edgefield, South Carolina, via Aiken to Augusta good for ten days with a change of trains in Aiken. When Mrs. Pickens tried to make the return trip and reached Aiken within the ten day period, she found that the connecting train from Aiken to Edgefield had been discontinued. She consequently had to leave the Aiken depot in a storm and suffered exposure which resulted in serious illness. Proof was presented that when the railroad sold the round trip ticket that the management knew that the Aiken-Edgefield train would be discontinued within the ten day period, although the agent who sold the round trip ticket did not know that fact. In keeping with the then existing practice there were two causes of action in the complaint, one based on negligence, the other on "wanton and reckless disregard of Plaintiff's rights." The Supreme Court of South Carolina in deciding the case sharply distinguished between the two legal principles, not as a difference in degree, but as a difference in fact and in principle. The Court quoting, with approval, from the American & English Encyclopaedia of Law, said—

> "The element which distinguishes actionable negligence from criminal wrong or wilful tort, is inadvertence on the part of the person causing the injury. He may advert to the act of omission of which he is guilty, but he cannot advert to it as a failure of duty—that is, he cannot be conscious that it is a want of ordinary care —without subjecting himself to the charge of having inflicted a wilful injury, because one, who is consciously guilty of a want of ordinary care, is, by implication of

> law, chargeable with an intent to injure, malice being but the 'wilful doing of a wrongful act' • • • Negligence and wilfulness are the opposites of each other. They indicate radically different mental states. The distinction between negligence and wilful tort is important to be observed, not only in order to avoid a confusion of principles, but it is necessary in determining the question of damages, since in case of an injury by the former, damages can only be compensatory; while in the latter, they may also be punitory, vindictive or exemplary."

We call especial attention as stating the crux of the matter to the statement of the Court that "negligence and willfullness are the opposites of each other." "Inadvertence" earmarks negligence; while "adverting" to what one should do and "consciously" failing to do it, earmarks recklessness or wantonness or willfulness. Of course, as the Court stated, actual damages are allowed in South Carolina in negligence cases, and punitive damage only where recklessness or wantonness or willfulness is present.

The Pickens decision was rendered in 1898. The distinction and the principle involved during the next twenty-five years are frequently enforced by the Supreme Court of South Carolina. In 1925 the Court in its decision in re *Bailey* v. *Smith,* 132 S. C. 212; 128 S.E., 423, collected most of the decisions of the period referred to, hence as covering that period, we quote somewhat copiously from the Bailey decision. The Court said:

> "Plaintiff's counsel cites the following cases as applicable to the facts of this case: Norris *v.* Greenville Ry., 111 S. C. 322; 97 S.E., 848. Bussey *v.* Charleston & W. C. Ry., 75 S. C., 129; 55 S.E., 163. Tinsley *v.* Western Union, 72 S. C., 350; 51 S.E. 913. Gedding *v.* Atlantic Coast Line R. Co., 91 S. C., 486; 75 S. E. 284; and Proctor *v.* Southern Ry. Co., 61 S. C. 170; 39 S. E., 351.

"In the Norris Case we find this definition of willfulness:

'These exceptions cannot be sustained, for the reason that not only is the conscious invasion of the rights of another in a wanton, willful, and reckless manner an act of wrong, but also when the wrongdoer does not actually realize that he is invading the rights of another, provided the act is committed in such a manner that a person of ordinary reason and prudence would say that it was a reckless disregard of another's rights.'

"In Bussey *v.* Railway the Court points out that recklessness is an equivalent of willfulness or intentional wrong:

'These exceptions must be overruled for the reasons that we have already shown there was testimony tending to prove recklessness, which is the equivalent of willfulness or intentional wrong. Pickett *v.* Railway, 69 S. C., 445; 48 S.E., 466.'

"In Tinsley *v.* Western Union we have this definition:

'An inadvertent failure to observe due care indicates mere negligence, but an advertent or conscious failure to observe due care passes beyond mere negligence into wantonness or willfulness.'

"Geddings *v.* Railroad Co. is to the same effect:

'It is only necessary to refer to the case of Tolleson *v.* Railway, 88 S.C., 7, to show that this exception cannot be sustained. In that case, the Court uses this language: "Not only is the conscious invasion of the rights of another, in a wanton, willful, and reckless manner, an act of wrong, but that the same result follows, when the wrongdoer does not actually realize that he is invading the rights of another, provided the act is committed in such a manner, that a person of ordinary prudence would say, that it was a reckless disregard of another's rights." '

"And Pickett *v.* Southern Ry. Co., 69 S. C. 445; 48 S.E., 466, quoting from an earlier case, points out that gross negligence amounting to recklessness becomes willfulness:

'In Proctor *v.* Railroad, 61 S. C., 170; 39 S.E. 351, the Court says: "It is quite true that negligence may be so gross as to amount to recklessness, but when it does, it ceases to be mere negligence, and assumes very much the nature of willfulness; so much so, that it has been more than once held in this state, that a charge of reckless misconduct will justify the jury, if the same be proved, in awarding punitive, vindictive or exemplary damages, while it never has been held, so far as we are informed, that the jury under a charge of mere negligence, would be justified in awarding vindictive or exemplary damages." ' "

The Bailey decision, although it practically covers the field of the period referred to, omits the following decisions, (and possibly a few others) from which we ask to quote briefly as follows:

Humphries v. *Railway Company,* 90 S. C., 442; 73 S.E., 870:

"From the testimony it will be seen there 'was no failure on the part of the defendant to observe due care,' as laid down in Watts *v.* South Bound R. R. Co., 60 S. C., page 67, 38 S.E. 240; Tinsley *v.* Telegraph Co., 72 S. C. page 350, 51 S.E. 913. There is no evidence showing that the servants of defendant consciously or intentionally did any act, or consciously or intentionally failed to do what it ought to have done at the time of the collision of the wagon in which plaintiffs were riding. There was evidence to prove ordinary negligence, but none to show conscious advertent wrong."

Lawson v. *Railway,* 91 S. C. 201, 74 S.E. 481.

"In Tinsley *v.* Telegraph Company, 72 S. C. 354-355 S.E. 913, the Court says: 'A conscious failure to observe due care is wantonness or willfulness.' "

Gossett v. *Telegraph Co.*, 95 S. C., 397, 79 S.E., 309.

Herein the following charge to the jury was approved by the Supreme Court. The presiding Judge had charged the jury as follows:

> "By the word negligence we mean the failure to observe due care. It is the failure to do that which a person of ordinary prudence would do under the same circumstances, or it is the doing of something that a person of ordinary prudence would not have done under the same circumstances. That is what we mean by negligence. It is the failure to observe proper care under the circumstances. Now, where a person simply fails to observe due care inadvertently, fails to do his duty, why you call that negligence, where he just simply fails, inadvertently fails, to do his duty; but where a person adverts to his duty and thinks about his duty and knows about his duty, and then consciously violates his duty, we call that willful."

In 1928, the Court re-affirmed the distinction in question, in *Glenn* v. *Railway Company*, 145 S. C., 41, 142 S.E., 801, saying:

> "Negligence signifies inattention, or, in other words, an unconscious failure to realize the danger of the situation. Willfulness signifies conscious disregard of consequences.
>
> "'In giving application and effect to the provisions of the statute, there should be kept in mind the distinction between negligence and willfulness, pointed out by Mr. Justice Jones, later Chief Justice Jones, in the case of Tinsley *v.* Telegraph Co., 72 S. C., 350; 51 S.E., 913:
>
> " 'An inadvertent failure to observe due care indicates mere negligence, but an advertent or conscious failure to observe due care passes beyond mere negligence into wantonness and willfulness.' "

Hence, the irresistible conclusion is that as the Supreme Court of South Carolina has definitely held repeatedly that

there is a vast difference between negligence on the one hand and willfulness, recklessness and wantonness on the other hand. The Supreme Court of South Carolina throughout the years has adhered to its first preachment in the *Pickens* case that "Negligence and willfulness are the opposites of each other"; and in the Bussey decision and the Pickett decision (referred to in the Bailey decision, *supra)* the Court definitely held that "recklessness, is the equivalent of willfulness."

Most of the decisions hereinbefore referred to deal with actionable negligence and actionable recklessness, willfulness and wantonness. There are, however, many decisions upon contributory negligence on the one hand and contributory recklessness, willfulness, and wantonness on the other hand.

For instance, it was once claimed that contributory willfulness is not a defense to willfulness. The following South Carolina decisions however, definitely hold to the contrary:

Spillers v. *Griffin,* 109 S. C., 78, 95 S. E., 133;
Chisolm v. *Railway,* 121 S. C., 394, 114 S. E., 500;
Colt v. *Britt,* 129 S. C., 226, 124 S. E., 845;
Osteen v. *Railway,* 119 S. C., 438, 112 S. E., 352;
Horne v. *A. C. L.,* 177 S. C., 461, 181 S. E., 642.

In *Spillers* v. *Griffin,* 109 S. C., 78, 95 S. E., 133, the Court undertook to set out the science of the matter. After adverting to the contention that contributory willfulness is not a defense to willfulness, the Court said:

> "If there is not law to allow the defense of contributory wilfulness, so there is not law that allows a plaintiff to recover when he has himsef contributed wilfully as a proximate cause to the injury, * * * Law is a science, and it is the duty of the Courts to apply well recognized principles of law to new conditions."

Thus it will be seen that no matter what has been the conduct of the defendant (whether negligent or willful) the plaintiff cannot recover "when he has himself contributed willfully as a proximate cause to the injury." This is our position herein.

Then the Court, dealing as it was in the *Spillers* case, alone with the question of whether contributory willfulness offsets willfulness, said:

> "When two people are equally at fault in producing the injury, the law leaves them where it finds them. • • • If the parties were equally, in the same class, to blame in producing the injury, neither can recover."

But if a man is reckless, willful or wanton, his conduct is more culpable than if he is merely negligent. Contributory negligence offsets negligence. *A fortiori,* certainly, contributory willfulness necessarily offsets mere negligence.

Judge Timmerman (the District Judge who tried this case) agreed with this view and held in his decree (R. 29):

> "The Supreme Court of South Carolina has held in effect that contributory recklessness, wilfulness or wantonness, if established, is a good defense in an action based on simple negligence • • • ."

Hence, we respectfully submit, that it definitely appears that the "applicable local decisions," namely the decisions of the Supreme Court of South Carolina recognize and establish a vast difference between negligence and contributory negligence on the one hand and recklessness, wantonness and willfulness and contributory recklessness, wantonness and willfulness on the other hand. The distinction is recognized, has been established and is applied in South Carolina, both in awarding actual or punitive damages, and also, and more to the point herein, in determining what conduct on the part of a plaintiff as a defense interposed by

a defendant, will bar his recovery. We alleged and were ready to prove contributory recklessness and wantonness on plaintiff's part—that he "advertently" and "consciously" failed to do what he as an electrician knew that he should do (R. p. 26) "in doing his work, with and about the fuses and the fuse box referred to in the Complaint."

Parenthetically, it should be stated that the defendant's answer was served before the Complaint was amended and it denies the allegations of the original Complaint not only of negligence, but also of gross negligence, willfulness and wantonness on the part of the defendant. The amended Complaint deleted these allegations, but it was stipulated that the Answer as originaly drawn should stand as the Answer to the amended Complaint. This accounts for the otherwise superfluous language in the Answer.

A Statute in Derogation of Common Law, Can Deprive a Litigant Only of the Rights Specifically Referred to Therein.

The Supreme Court of South Carolina has definitely recognized and established as the law of South Carolina the general rule as above stated in a form applicable to this case.

At common law a defendant, certainly in South Carolina, in a tort case brought against him, by his employee, has available to him the defenses that (1) the plaintiff-employee was negligent, (2) that the plaintiff-employee was reckless or wanton or willful, (3) the defense of assumption of risks and (4) the fellow servant defense. Section 15 of the Act, in derogation of common law deprives the defendant, who elects not to operate under the optional Compensation Act, of three of these defenses, but definitely refrains from depriving him of the defense that the plaintiff-employee was reckless and wanton.

The undoubted rule in South Carolina and elsewhere we submit is that only the exclusions that are specifically named are effective deprivations of the defendant's hitherto legal defenses.

We quote briefly from several decisions of the Supreme Court of South Carolina.

In *Beaty* v. *Richardson*, 56 S. C. 173, 181; 34 S. E. 73, the Court said:

> "Every statute derogatory of the rights of property, or that takes away the rights of a citizen, is to be strictly construed. So, also, a statute in derogation of the common law."

In *Clegg* v. *City of Spartanburg*, 132 S. C. 182, 190, 128 S. E. 96, in reference to Statutes, the Court said:

> "Under the general principle of interpretation, expressio unius est exclusio alterius."

In *Powell* v. *Greenwood County*, 189 S. C. 463, 465; 1 S. E. (2nd) 624, in which the question was whether "a statute providing for division between railroad and county of cost and maintenance of structures for elimination of grade crossings" held that its provisions did not permit a railroad to recover the cost of the repairs of a replacement bridge made by a railroad, on a county highway. The Supreme Court adopted with approval the following language of the Circuit Judge:

> "I am of the opinion that Sections 8437 to 8447 apply only to the elimination of existing grade crossings. These sections are in derogation of the common law and therefore will have to be strictly construed."

In *Nuckolls* v. *Tea Company*, 192 S. C. 156; 5 S. E. (2nd) 862, in which the provision of the Workmen's Compensa-

tion Act of South Carolina in question, was directly involved, the Supreme Court of South Carolina ruled:

> "Regarding the presumption against change of the common law by a statute, it is stated in 25 R. C. L. 1054, that it is not presumed that the Legislature intended to abrogate or modify a rule of the common law by the enactment of a statute upon the same subject; that it is rather to be presumed that no change in the common law was intended unless the language employed clearly indicates such an intention; that the rules of the common law are not to be changed by doubtful implication or overturned except by clear and unambiguous language."

Hence, we submit that when Section 15 of the Act deprived the defendant, in derogation of common law, of the three defenses mentioned, and not the defense of contributory recklessness, willfulness and wantonness, that it was, *ipso facto,* left intact.

We recognize, of course, the fact that the general rule is that Workmen's Compensation Acts must be liberally construed as to cases which actually come within its purview, but the rule is entirely different when the question which comes before the Court, is what matters the Act actually reaches. *Tedars* v. *Veneer Company,* 202 S. C. 363; 25 S. E. (2nd) 235.

A Respectful Reply to the Legal Positions Embodied in the Decision of the Circuit Court of Appeals

The chief postulate of the decision herein of the Circuit Court of Appeals (R. 19) is that it is perfectly clear that the purpose of the South Carolina Workmen's Compensation Act as established, the Court says, by the Supreme Court of South Carolina in its decision in re *Nuckolls* v. *Tea Company, supra,* "was to deny to the employer who elected not to operate under it the standard defenses of assumption of risk, the fellow servant rule and contributory negligence

in a suit for damages by an employee and leave, for practical purposes, only the question whether defendant was negligent and whether that negligence was the proximate cause of the injury."

We respectfully submit that the Nuckolls decision does not support this ruling. If it touches the instant case it supports our position, in that what it actually states is that the defense, as to negligence, that is barred by the statute is contributory negligence. The South Carolina Court simply was not passing on the question involved in the *Odom* case; the point that the Court was passing on was the plaintiff's contention that all that he had to prove in order to carry his case to the jury, was an injury arising out of an accident while working for his employer, that is to say that as to an employer who has elected not to operate under the Act, the plaintiff did not have to prove any negligence on the part of an employer as a proximate cause of the injury, but that the burden of proof is cast by the Statute on the employer.

What the Supreme Court of South Carolina did and all that it did, on this point, was to reject that contention. The Court after quoting the statutory provision in question said,—

> "Hence our Act, which is elective, deprives the employer who does not elect to come thereunder, of the common-law defenses of assumption of risk, fellow-servant rule, and contributory negligence.
>
> "However, common-law recovery against an employer who elects to remain outside the Workmen's Compensation Act, is still predicated upon actionable negligence. Even with the defenses removed, the employee has the burden of proof on the issue of the employer's negligence. Such an employee, although benefiting by the taking away of the defenses enumerated, must still prove facts showing actionable negligence upon the part of the employer, and, proceeding at com-

mon law, prove his common-law right to recovery. The statute purports only to deprive the non-assenting employer of certain named defenses, and it was not the intention of the Legislature, as we view it, in addition to abrogating those defenses, to establish a statutory right of recovery based on the fact that the employee sustained injuries 'by accident arising out of and in the course of his employment'."

We respectfully submit that the main postulate of the Circuit Court of Appeals decision is not supported by the Nuckolls decision, but that its every intendment is to the contrary.

This intendment referred to is carried forward by the Supreme Court of South Carolina in a very recent Workmen's Compensation decision, *Caughman* v. *Y. M. C. A.* (Westbrook's Report of May 15, 1948), in which the Court ruled,—

> "Our Act is not compulsory. Either the employer or the employee may elect not to be bound by its provisions. If the employer does so, he is only deprived of the common law defenses of assumption of risk, fellow servant rule and contributory negligence if sued by any employee for damages at common law, Section 7035-17 of the 1942 Code; Nuckolls *v.* Great Atlantic & Pacific Tea Co., 192 S. C. 156, 5 S. E. (2nd)."

We re-iterate the contention that the Nuckolls decision, relied on by the Circuit Court of Appeals, does not support the major premise of its opinion herein. The point involved in this case, was simply not involved in the Nuckolls decision. But the Nuckolls decision did endorse, as we have hereinbefore pointed out the fact that as the statute which is in derogation of common law, listed three defenses that the employer is deprived of, that he is not deprived of any not listed—*expressio unius est exclusio alterius.*

Nor has the Court, nor counsel cited any decision by the

Supreme Court of South Carolina, nor by any Court which supports the doctrine in question. We submit that the logic of the matter is to the contrary.

So far as our own thinking is concerned, we reduce our reply to the Circuit Court of Appeals' reasoning to a very simple formula. We submit that if the Legislature of South Carolina, had intended, as the Court holds, to provide that in cases like the present one the only questions for trial would be whether the defendant was negligent, and whether that negligence was the proximate cause of the injury, the Legislature would have said so in plain English. But it did not.

The second postulate of the decision of the Circuit Court of Appeals is that the employer may not avail himself "in the teeth of the statute" of the rejected defense by simply calling the employee's mere contributory negligence, by another name. We agree, of course, with this statement but submit that the Supreme Court of South Carolina has definitely held that contributory negligence is a distinct and different thing from contributory recklessness, wantonness and wilfulness. That Court in the Pickens decision *supra* held, "negligence and wilfulness are the opposites of each other." The Circuit Court of Appeals cited the decision of the United States Supreme Court in *Tiller* v. *Railroad*, 318 U. S. 54, 87 L. Ed. 610, as supporting its conclusion. The Court therein did, of course, state that where the elements considered therein were simply different degrees of assumption, of risk, that the appellant could not, by calling the element he wished to avail himself by a different name, circumvent the existing inhibition. Certainly that is correct. But in the instant case we are dealing with, the Supreme Court of South Carolina has held, different and distinct legal elements and doctrines.

The third position stated by the Circuit Court of Appeals is that "while the question here has not been before the

Supreme Court of South Carolina" that in *Thornhill* v. *Davis*, 121 S. C. 49; 113 S. E. 370, that Court "has ruled in a federal employer's liability case that 'contributory recklessness and wilfulness' might not be treated as a defense distinct from contributory negligence."

The Thornhill decision was rendered by an Acting Associate Justice (Mr. Harry N. Edmunds, who temporarily sat with the Court), and if from his language any such conclusion as the Court suggests can be gleaned, it was certainly a mere obiter on his part and cannot be taken as abrogating the many decisions of the more permanent members of the Court, cited hereinbefore, some rendered before the Thornhill decision was rendered and many after, to the effect that negligence and recklessness, wantonness and willfulness are the opposites of each other. But a careful examination of the decision shows no such intention even on the part of the Acting Associate Justice.

We do not burden this brief with a discussion of the Thornhill decision, but state that if the Court is interested in analyzing it, the Court will find that the defense of contributory negligence, not contributory recklessness or wantonness or willfulness, was pled. The Court will further find that the remark of the Acting Associate referred to was directed to the refusal of a motion for a directed verdict on the ground that deceased had met his death by his own gross negligence, when gross negligence was not even pled, and certainly contributory recklessness, wantonness and willfulness was not pled. Hence the question of the effect of the latter element was not before the Court and it easily followed therefore, (without the point herein involved being before the Court) that a directed verdict therein could not have been granted. The Court, if it examines the Thornhill decision, will find that the only assignments of error that approach the present question raise the contention that the presiding Judge "erred in failing to charge

the jury that the plea of contributory 'recklessness or wilfulness' was a complete defense under the Federal Employer's Liability Act." Manifestly these assignments of error were not sustained. There was no pleading to raise the question, nor was a request to charge presented. We submit that the Thornhill decision is not pertinent to the present inquiry.

To summarize we submit in reply, as to the decision herein,

(a) That neither the Nuckolls decision nor any other decision of the Supreme Court of South Carolina holds that the effect of its Workmen's Compensation Act, in cases against employers who elect not to operate under it, is to limit the question to be tried by the Courts solely to the question of whether the employer has been guilty of negligence and whether that negligence was the proximate cause of the injury. We submit that the true rule is to the contrary.

(b) That while the doctrine of the Tiller decision to the general effect, to apply to this case, that the employer may not avail himself of an inhibited defense by calling it by another name, is undoubtedly correct; that such doctrine does not apply to the instant case.

(c) That the Thornhill decision does not control the present case.

POINT B

The Circuit Court of Appeals erred, we respectfully submit, in not passing on and in not sustaining petitioner's second point on which it relied in its appeal to that Court (R. 33) which raised a Federal question and a Constitutional point.

By its second point (R. p. 33) petitioner contended and now contends and submits that the action of the presiding

Judge in dismissing and striking defendant's second defense of contributory recklessness and contributory wantonness throughout the trial which is a separate and distinct defense from contributory negligence, with the verdict rendered upon the trial and the resultant judgment and its threatened collection constitutes the taking of defendant's property without due process of law in violation of the due process clauses of the Constitution of the United States.

POINT C

The Circuit Court of Appeals erred, we respectfully submit, if it intended so to rule, in not giving the appellant the full benefit of the Stipulation of Counsel.

It was stipulated and agreed between counsel for the appellant and the appellee, in a written and signed agreement (R. p. 28), as follows—

> "The case then went to trial and was tried throughout, subject to and in accordance with the aforesaid ruling of the Court, and upon the theory and basis and with the effect of the defendant not being permitted to defend the suit on the grounds of contributory negligence, recklessness and wantonness."

The ruling referred to was, of course, the District Judge's order striking the second defense from the answer. This stipulation absolutely squares with the facts as revealed by the record and the facts which necessarily and naturally existed.

We do not know that the consideration of this matter is at all necessary in the consideration of this petition because the Circuit Court of Appeals does not rely upon this point, but in reality bases its decision squarely on the merits of the main question involved and seems to be quite willing for the Supreme Court to pass on the main question. How-

ever, in the second paragraph of its decision the Court says "the evidence on the trial was not brought up with the record and it does not appear that, even if the defense were available in a proper case, that the defendant was prejudiced by striking it here," and the Court further says that "it is perfectly clear from the pleadings and statements at the bar of the Court that the facts upon which the defendant relied amounted to nothing more than contributory negligence" and that if the Court entertained any doubt thereabouts, it would order the record to be sent up, but that this is not necessary as the Court says, in effect, that it stands on the merits of the legal question. As the Court did not order the testimony sent up, and therefore has not considered what it might reveal, we submit that this phase of the matter is not now pertinent. If it is pertinent, we submit, that all parties were bound by the sensible and unequivocal stipulation which they agreed to.

The Court says, however, that the pleading revealed only contributory negligence. To the contrary, we submit that the answer (R. p. 26) definitely pled contributory recklessness and wantonness. The Court also refers to "statements at the bar of the Court." It does not say what these statements were or by whom they were made. If statements at the bar were to be mentioned at all, we would have preferred that this be done. Inasmuch, however, as it has not been done by the Court we presume counsel should not attempt to do so. Certainly then we go back to the stipulation, which is complete and logical, namely, that the case was tried throughout subject to and in accordance with the ruling of the District Judge who struck out petitioner's second defense. Hence the defense was never before the jury. The jury, therefore, knew absolutely nothing of its existence. It was a hushed and forbidden subject in the trial. Even if incidentally some facts came out on which it

might have been based, they could not be pointed up, stressed and connected up by counsel. The subject, we repeat was a forbidden subject. Sending up the record now as the Court suggests would do no good, because the record was not built with the question involved as a part of it. The question was, we repeat, a completely forbidden subject. The District Judge could not and did not rule on the sufficiency of the testimony because, as we have stated, counsel for the defendant was not permitted by the Court to build up a record to present that question but was reprimanded when the Court thought he was trying to do so. Counsel for the plaintiff having already been successful in striking the defense from the answer, was not interested in the point. Then, of course, counsel could not even mention contributory recklessness, wantonness, or wilfulness in argument, nor did the District Judge do so in his charge. So the stipulation was literally correct.

We earnestly submit that the Writ of Certiorari should be granted.

P. F. HENDERSON,
HENDERSON & SALLEY,
Petitioner's Attorney.

Aiken, South Carolina, June 17th, 1948.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 113

BATH MILLS, INC., *Petitioner and Appellant*

vs.

THEODORE ODOM, *Appellee and Respondent*

REPLY BRIEF

We ask to reply to Respondent's Brief as follows:

An Important Question of Local Law Is Undoubtedly Involved Herein

Respondent's counsel see fit in their brief to resort to a highly technical objection, namely, that under Sec. 1 of Rule 12, Appellant, as they state it at p. 18 of their brief, "has failed to show and prove the basis upon which it is contended that the Court has jurisdiction." The reference is to whether an important question is involved herein.

To begin with Rule 12, Sec. 1, has to do with appeals alone, not petitions for writs of ceritorari. Rule 38 governs petitions for writs of certiorari. That rule is complied with, we submit, by the respondent herein. See p. 5 of petition and pp. 11, 12, 13 of respondent's supporting brief.

The fact that in reality the question involved is an important one stands out throughout the petition and supporting brief and the whole case is redolent of that fact, for the following reasons and others,—

(1) At common law employers have the right to defend on the ground not only of contributory negligence but of contributory recklessness and wantonness. If the South Carolina Workmen's Compensation Act has been improperly construed and enforced by the Circuit Court of Appeals herein, in view of the decisions of the South Carolina Supreme Court, then the employer herein is being deprived of Five Thousand Dollars without due process of law. (This observation also constitutes our reply to Respondent's point B.)

(2) Respondent does not and cannot deny that there are many employers in South Carolina who have exercised their right not to operate under its entirely optional Workmen's Compensation Law. The decisions of the Supreme Court of South Carolina cited and quoted from, in appellant's supporting argument (p. 23-25) of Nuckolls Tea Co. 192 S. C., 156; 5 S. E. (2nd) 862 and *Caughman* v. *Y. M. C. A.*, Westbrooks Reports of May 15, 1948, definitely prove this fact. Hence, it follows that to many employers and thousands of employees in South Carolina a decision of the point involved, to govern existing and future lawsuits, is vastly important.

(3) While a complete list of states in which optional Workmen's Compensation Statutes are in force is not available to us, the notes to the treatment of the subject of the optional statutes, in Schneider's work on "Workmen's Compensation Law" (p. 63 et seq.) definitely shows that there are many such states, and this work at p. 104, states that "many of the acts which are elective" deprive

the defendant of the defense of contributory negligence. The author in his footnote supporting this statement, lists decisions from twelve states. Hence, thousands of employers and myriads of employees not only in South Carolina, but throughout the nation are concerned with the question herein presented. It is a matter of prime importance, we submit.

Is the Decision Below, Contrary to the Local Decisions?

Despite the imposing array of decisions by the Supreme Court of South Carolina which are set out in appellant's brief to the effect that recklessness, wilfulness and wantonness and contributory recklessness, wilfulness and wantonness on the one hand, are separate and distinct legal doctrines and principles from mere negligence and contributory negligence on the other hand, the second postulate of Respondent's argument is that in reality recklessness, wilfulness and wantonness are mere degrees of negligence. This position is taken with no reference to and indeed with a complete and studied disregard (because it cannot be answered) of the fact that the Supreme Court of South Carolina in *Pickens* v. *Railroad* 54 S. C. 498; 32 S. E. 567, has ruled "*Negligence and wilfulness are the opposites of each other.*"

Respondent's argument is based practically solely upon the opinion written by a temporary occupant of a seat on the bench of the Supreme Court of South Carolina (Mr. Harry N. Edmunds) which has never been followed by other decisions and which, if it supports respondent's position (which fact, we deny), is in the teeth of myriads of the decisions rendered both before and after his decision. Further, it is a fact that Respondent's contention is based on two disconnected excerpts from the acting Associate Justice's

opinion which definitely, we submit, do not correctly set out even his meaning.

We do not imagine that the Supreme Court of the United States is, at this time, interested in dissecting this passing opinion but inasmuch as respondent's entire argument is practically based upon it, we are, at the risk of prolixity, setting out in an appendix hereto, the whole of the opinion touching the point at issue with some comments by us, for the convenience of the Court, should it desire seriously to consider the opinion in question.

Including those decisions of the Supreme Court of South Carolina from which quotations appear in the opinion, in re *Bailey* v. *Smith* 132 S. C. 212, 128, S. E. 423 from which we quoted copiously in our supporting brief, we have heretofore presented fifteen decisions of the Supreme Court of South Carolina supporting our contention of what that court has held. Respondent's reliance is practically based solely on the Thornhill decision. *Bailey* v. *Smith* itself which collected practically all of the older decisions and approved them, and four of the other decisions set out in our supporting brief were handed down after the *Thornhill* case was decided. All definitely support our contention.

We thought this was enough, but so frequent have been the decisions of the Supreme Court of South Carolina upon that question that we can easily lengthen the list. All of the following additional decisions, in one form or another, support our contention to the effect that negligence and contributory negligence on the one hand are, in South Carolina, different principles from recklessness and wilfulness and contributory recklessness and contributory wilfulness on the other hand. Those decisions now listed as reported in volumes subsequent to 121st South Carolina Reports in which the *Thornhill* case is reported, were rendered after that decision was handed down. It, therefore, follows that

Thornhill decision did not change in the slightest degree the long existing rule which still exists in South Carolina. We list:

Watts v. *Rwy.*, 60 S. C. 67; 38 S. E. 240;
Oliver v. *Rwy.*, 65 S. C. 1; 43 S. E. 307;
Boyd v. *Rwy.*, 65 S. C. 326; 43 S. E. 817;
Bennett v. *Union Station Co.*, 90 S. C. 308; 73 S. E. 340;
Burns v. *Kendal*, 96 S. C. 385; 80 S. E. 621;
Wanamaker v. *Traywick*, 136 S. C. 21; 134 S. E. 234;
Weeks v. *Power Co.*, 156 S. C. 158; 153 S. E. 119;
Leppard v. *Railway*, 174 S. C. 237; 177 S. E. 129;
Anderson v. *Railway*, 179 S. C. 367; 184 S. E. 164;
Sanders v. *Railway*, 180 S. C. 138; 185 S. E. 180;
Cox v. *Coleman*, 189 S. C. 218; 200 S. E. 762.

The Supreme Court of South Carolina has steered a straight course as to this question. In the Pickens decision it ruled that "Negligence and wilfulness are the opposites of each other". In later decisions it elaborated on this principle. It pointed out that while lack of due care is involved in each instance, that inadvertence as to performing the duty of exercising due care on the one hand and an advertent failure to do so on the other hand is the differentiating factor between negligence and gross negligence on the one hand and recklessness, wilfulness and wantonness on the other hand. But when the lack of due care ceases to be an unconscious failure of duty and becomes a conscious, an advertent failure of duty, its whole nature changes. That is the whole meaning of all of the decisions of the Supreme Court of South Carolina.

The question is not, in reality, as Counsel and the learned District Judge, who tried the case, considered it, we submit, of degrees of negligence, but of the employee's state of mind. If he inadvertently failed to exercise due care he was guilty of negligence, whether it was ordinary negligence or

gross negligence. On the other hand if he consciously, advertently failed to exercise due care, he was guilty of the opposite of negligence, he was guilty of recklessness, wilfulness or wantonness. This is the crux of the matter.

We have advisedly stated that respondents counsel base their argument practically entirely on the Thornhill decision. This is an absolutely correct statement, we submit. They, however, also mention but four other decisions, which, we submit, are not apposite to the present inquiry and which we ask now to briefly refer to.

Four Other Decisions Cited By Respondent

Counsel invoke the expression contained in the opinion of the Supreme Court of South Carolina in *Bell* v. *Railroad*, 202 S. C. 160, 24 S. E. (2d) 177, based on the decision of the Court in *Sample* v. *Gulf Refining Co.*, 183 S. C. 399, 191 S. E. 209, that:

> "While punitive damages are recoverable for negligence so gross or reckless of consequences as to imply or assume the nature of wantonness, wilfulness or recklessness, yet they are not awarded in this State for mere gross negligence."

It is significant to note that in the *Sample* case, there was a reversal because the presiding Judge had charged the jury that punitive damages could not be awarded, in a case of injury to plaintiff's business:

> "Unless the defendant was so grossly negligent in determining whether it would injure or damage his business."

Manifestly what the Supreme Court, in granting a new trial on account of the foregoing charge, was ruling in the language relied on by counsel, was simply and only that gross negligence was not enough to warrant imposing puni-

tive damages. The Bell decision does not carry the matter further.

What the language relied upon actually states is that in order to permit the imposing of punitive damages the conduct in question must be so reckless of consequences as to assume the nature of wilfulness. This is nothing more than the statement of the Court (set out on page 9 of our argument in chief) in the Tinsley decision that:

> "An inadvertent failure to observe due care indicates mere negligence, but an advertent failure to observe due care passes beyond mere negligence into wantonness or wilfulness."

Nor is the language of the Sample decision anything more than the doctrine of the Proctor decision (also set out on page 9), that:

> "It is quite true that negligence may be so gross as to amount to recklessness, but when it does it ceases to be mere negligence, and assumes * * * the nature of wilfulness."

This we again submit is the crux of the matter. It *ceases to be negligence entirely.*

Respondents counsel at pp. 8-9 of their brief refer to *Templeton* v. *Railroad,* 117 S. C. 44; 108 S. E. 313 which is entirely inapplicable to the present inquiry, we submit, in that it only holds that under the Federal Employers Liability Act gross negligence is not a separate principle from negligence. The principle of recklessness and wilfulness was not even remotely involved.

Respondents counsel also cite *Baxley* v. *Railroad,* 193 S. C. 429; 8 (2d) S. E. 744 and *Cook* v. *Railroad,* 183 S. C. 279; 190 S. E. 923 at pp. 10-11 of their brief. In reply we wish to point out that the Baxley decision has no application to the instant case, as that case was brought under the

railroad crossing statute which makes gross negligence a perfect defense to the recovery of any damages, in a crossing accident case such as the *Baxley* case. And the Cook decision is not apposite to the instant case, because its holding is simply a restatement of the doctrine enunciated long ago in South Carolina that punitive damages cannot be awarded unless plaintiff has suffered some actual damage, although it may be merely nominal. Further as to so much of the Cook decision which counsel claims "held that exemplary damages which must be based upon recklessness or wantonness 'do not and cannot exist as an independent cause of action' "; we ask to cite the subsequent decision of the Supreme Court of South Carolina in re *Hallman* v. *Cushman*, 196 S. C. 402, 135 S. E. (2d) 498, in which the Supreme Court of South Carolina said:

> "It is true that a cause of action for punitive damages and a cause of action for actual damages are logically and technically separate and distinct, although they may be pleaded together under the statute frequently termed the 'jumbling act.' Sode 1932, see 484."

The Effect of Counsels Stipulation and Agreement

Under the heading "The Circuit Court of Appeals did not depart from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision," respondents say that they are at a loss to understand our position on this point. Hence, we briefly restate it.

The solemn stipulation of counsel herein (R. 26-8) after reciting that the District Judge struck out the defense of contributory recklessness and contributory wilfulness, definitely stated:

> "The case then went to trial *and was tried throughout*, subject to and in accordance with the aforesaid ruling of the Court, and upon the theory and basis and

with the effect of the defendant not being permitted to defend the suit on the grounds of contributory negligence, recklessness and wantonness." (Emphasis added.)

The Circuit Court of Appeals without referring at all to this stipulation which governed the case, said that as the evidence had not been brought up that it could not be sure that the defendant was prejudiced by its defense having been stricken out. The Court added that it was "perfectly clear from the pleadings and statements at the bar of the Court that the facts upon which defendant relied amounted to nothing more than contributory negligence." But the Court, in effect, immediately revealed the fact that it did not rely on that point. Manifestly the answer positively alleged (R. p. 26) contributory recklessness and contributory wantonness; and certainly, the Court's treatment of the matter shows that no "statements at the bar" admitted or substantiated the contrary view. Otherwise the Court would have disclosed the statements, (as we wish it had) and would have taken positive action then and there. But the Court did not do this, but passed this phase of the matter over as being unconsequential, as it was, and immediately went on to state that if it "entertained any doubt as to the correctness of the Court's action in striking the defense, we would order the remainder of the record sent up, so that we might judge upon the whole case whether defendant had suffered prejudice as a result of the ruling." But the Court did not order the record sent up, and the Court in the next sentence made clear, we submit, that it was not depending upon or basing its decision at all on its previous statement by definitely stating:

"It is not necessary to do this, however, as we are satisfied that the action of the Court in striking the defense was proper."

Hence, our position and understanding of the matter is that the Court did not base its decision on the consideration referred to, but based it definitely on the clear-cut legal question involved. But we submit that if we are wrong in this understanding and if the decision of the Court is not to be considered as being grounded on that clear-cut legal question, then with the greatest respect possible, we submit that the Court to use the words of Rule 38 "so far departed from the accepted and usual course of judicial proceedings • • • as to call for an exercise of this court's power of supervision." We do not consider however that such a situation exists, but that we have to deal only with the clear-cut legal question.

Finally we wish to reiterate what we stated in our supporting brief, namely, that as the stipulation and argument of counsel states, the case was tried throughout, subject to and in accordance with the ruling of the Court. We stated at pp. 30-31 of our supporting brief as follows:

> "Hence the defense was never before the jury. The jury, therefore, knew absolutely nothing of its existence. It was a hushed and forbidden subject in the trial. Even if incidentally some facts came out on which it might have been based, they could not be pointed up, stressed and connected up by counsel. The subject, we repeat was a forbidden subject. Sending up the record now as the Court suggests would do no good, because the record was not built with the question involved as a part of it. The question was, we repeat, a completely forbidden subject. The District Judge could not and did not rule on the sufficiency of the testimony because, as we have stated, counsel for the defendant was not permitted by the Court to build up a record to present that question but was reprimanded when the Court thought he was trying to do so. Counsel for the plaintiff having already been successful in striking the defense from the answer, was not interested in the point. Then, of course, counsel could not even

mention contributory recklessness, wantonness, or wilfulness in argument, nor did the District Judge do so in his charge. So the stipulation was literally correct."

The correctness of this contention has in no means been questioned in respondent's brief.

We earnestly submit that the Writ of Certiorari should be granted.

Note—It has been called to our attention that the Circuit Court of Appeals in its decision inadvertently stated that the appellant is a corporation of the State of South Carolina. This is of course a mere inadvertence. The complaint shows to the contrary and the stipulation of counsel recites the regular removal of the case to the United States Court, and there was no motion to remand.

Respectfully submitted,

P. F. Henderson,
Henderson & Salley,
Appellant's Counsel.

Aiken, S. C.
July 27, 1948.

APPENDIX

Note—In this appendix for the purpose of making references thereto, we have numbered the eight quoted paragraphs and have added some emphasis.

Thornhill *vs.* Davis, 121 S. C. 49; 113 S. E. 370.

"The opinion of the Court was delivered by Acting Associate Justice H. N. Edmunds."

(After a short preliminary statement as to the complaint, the opinion reads:)

(1) "The answer, in addition to denying the allegations of the complaint setting forth the alleged delicts on the part of the defendant, sets up the defenses of *contributory negligence* and assumption of risk. The issue thus being joined, the action came on for trial before Hon. George E. Prince and a jury at the April term, 1921, of the Court of Common Pleas for Greenville County.

(2) "Motions were made by the defendant for a nonsuit, and for a direction of verdict, both of which were overruled. Subsequently a verdict was rendered by the jury in favor of the plaintiff in the form which will hereinafter be referred to more particularly in considering the exceptions relating to the form of the verdict.

(3) "*The plea of contributory negligence* on the part of the plaintiff's intestate, and the testimony relating thereto, form the basis of one of the principle exceptions made by appellant. We will accordingly take up the consideration of this matter first.

(4) "Contributory negligence as a defense is applicable to an action under the Federal statute to the extent, but to the extent only, of operating to minimize the damages in case the jury should find that the injured party was guilty of contributory negligence in the particulars alleged in the answer. The appellant contends that this rule does not apply in the present

case, for the reason that the testimony established, not merely contributory negligence on the part of the plaintiff's intestate, but established contributory recklessness and willfulness. The answer with great particularity alleges the facts constituting the defense of the alleged contributing cause on the part of the deceased, alleging that—

(5) "He had gone 'to the end of said string of cars for the purpose of seeking shade and sat upon the rail at the end of the car; * * * that in this position * * * the engine * * * coupled up * * * to the said car at the opposite end of said string of cars, the impact of which caused the car against the wheel of which the deceased was leaning to run over and kill the deceased; *and that the deceased was negligent of his own safety.*'

(6) "The assignments of error under the seventh, eighth, thirteenth, and seventeenth assignments are that the trial judge erred in overruling the motion for a directed verdict upon the ground that the testimony showed that the deceased met his death by his own gross negligent and careless act, *as was set up in the defense referred to,* and, further, that the trial Judge erred in *failing to charge* the jury that the plea of 'contributory recklessness or willfulness' was a complete defense under the Federal Employers' Liability Act—that is to say, that while the defense of contributory negligence merely operates in mitigation of damages, on the other hand contributory recklessness or willfulness operates as a bar to the action when established by competent testimony.'

(7) "*While it is not essential to our conclusion* upon the exceptions raised relating to this matter, it may be remarked that Congress in limiting the force and effect of contributory negligence in an action of this character had in mind the changing of the application of the rule of evidence in such cases. Instead of such evidence operating to defeat the right of action entirely, after

the passage of the act, in cases brought under the act, such evidence operates only to a reduction of the damages which the plaintiff would otherwise, in the absence of such contributing cause, be entitled to receive. Under this rule of law, the matter of contributory negligence *and the degree thereof,* if any, becomes one for the jury to consider in determining the amount of damages which should be awarded in case it should be found that any damages were recoverable. The reduction in amount then would vary with the degree of negligence operating as a contributing proximate cause to the injury by the injured party—if slight, the jury would be warranted in making a slight reduction in the amount which it would have otherwise awarded; if great, it would be warranted in making an entirely different estimate of the amount to which the damages should be reduced. The allegations of the degrees of negligence and the proof thereof are matters then to be considered by the jury in reaching its conclusion as to the amount to be awarded after having concluded that a case of liability has been established. *In any event, of course, it is essential that liability* must be established, and the necessity therefor eliminates recovery when the injury complained of is caused solely by the act of the one injured, whether it be done by him either negligently or recklessly. There is left open, however, in all cases where the evidence is conflicting, the deter mining by jury of the amount of recovery and the proper reduction thereof to be varied, as we have said, according to the degree contributed by the injured party to his injury.

(8) "*Whether then* there was error on the part of the trial Judge in the particulars assigned depends upon whether from the testimony it was to be concluded as a matter of law that the deceased came to his death solely on account of the acts alleged in the answer by way of affirmative defense, or whether there was an issue of fact with regard thereto to be submitted to the jury. The appellant assumes that the defense was

established *by uncontradicted testimony,* and that the only conclusion which could be drawn from the testimony was that the plaintiff's intestate, as stated in the motion, met his death 'solely by reason of his own gross negligent and reckless conduct' in the particulars set forth in the motion. *That the testimony was susceptible of an entirely different construction,* that a clear issue of fact was made, and that the issue on this point was one to be passed upon by the jury is apparent from the reading of the testimony. The jury could have adopted appellant's view, namely, that the plaintiff was performing his duties as foreman of a maintenance force clearing the tracks of the appellant, in which work the plaintiff was actually engaged at the time when, without warning and without observing the proper precautions under the circumstances alleged, and as testified to, the plaintiff's intestate was run over and killed by the train operated by the defendant. *The trial Judge,* however, with a conflict of testimony on the issues thus joined, *could not adopt either view*—to have done so would have been error—*and his refusal to do so was proper.* The assignments of error relating to these matters cannot, therefore, be sustained.' ''

Our comments are:

(1) The defense that was interposed by the Answer was mere *contributory negligence,* not as respondent states (p. 6 of their argument) "the plea of contributory recklessness or wilfulness as a complete defense under the Federal Employer Act."

Not being pled contributory recklessness and wilfulness was not before the Court in the Thornhill case. It is definitely pled in the Odom case.

(2) Evidently defendant's attorney in arguing the appeal, although he had failed to plead it, raised the point that contributory recklessness or wilfulness might be a complete defense. He, however, had not properly raised the point. But the Acting Justice, nevertheless but saying explicitly in the opening words of the seventh paragraph of the foregoing quotation, "*while it is not essential to our*

conclusion upon the exceptions raised relating to this matter," stated as his personal opinion only that "the matter of contributory negligence *and the degree thereof,* if any, becomes one for the jury to consider in determining the amount of damages." Let it, however, be noted especially that the Justice did not consider that the point had been raised by the exception.

Then the Justice, having in passing and as a mere obiter on his part made the reference referred to (which he had prefaced by saying that it was "not essential," *upon the exceptions raised*), in the final paragraph of the foregoing excerpt as his real conclusion of the matter, ruled that a directed verdict could in no event have been rendered because the testimony was conflicting.

(3) In the sixth paragraph of the foregoing excerpt, it appears that the assignments of error were:

(a) Error "in overruling the motion for a directed verdict upon the ground that the deceased met his death by his own gross negligent and careless act *as was set up in the defense referred to,*" and

(b) Error "in failing to charge the jury that the plea of contributory recklessness or wantonness was a complete defense."

As to (a) we call attention again to the fact that the emphasized statements in paragraphs (1) and (5) of the above excerpt show definitely that only "contributory negligence" in "that the deceased was negligent of his own safety" was pled. Hence, the question of contributory recklessness and wilfulness was never properly presented to the Court.

As to (b) we make the same remark and add that as no request to charge was presented there could be no error in any event, not to so charge.

We respectfully submit that the Thornhill decision did not alter the firmly established South Carolina rule, which was first enunciated in the Pickens decision in 1898 and which has been consistently followed to the present day.

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Supreme Court of the United States

OCTOBER TERM, A. D., 1948

No. 113

BATH MILLS, INC., PETITIONER,

versus

THEODORE ODOM, RESPONDENT

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

1.

THE OPINIONS OF THE COURTS BELOW

The opinion of the District Court of the United States for the Eastern District of South Carolina was rendered September 18th, 1947, and is printed in full in the Record (pp. 28-31). The opinion of the United States Circuit Court of Appeals, Fourth Circuit, is dated April 29th, 1948, and is printed in full in the Record (pp. 18-21.)

2.

JURISDICTION

The appellant seeks to invoke the jurisdiction of this Court under Section 240 (a) of the Judicial Code (28 U. S. C. A. 347) and contends that under the provisions of Rule 38 of the Rules of the United States Supreme Court a writ of Certiorari should be granted to review the decisions of the United States Circuit Court of Appeals, Fourth Circuit.

We respectfully submit that the jurisdiction of this Court should not be invoked for the reasons hereinafter urged.

3.

STATEMENT OF CASE

This action was instituted by the respondent (plaintiff below) in the Court of Common Pleas for Aiken County to recover damages against the defendant for injuries sustained by the plaintiff arising out of and in the course of his employment, and the case was thereafter removed by the defendant to the United States District Court for the Eastern District of South Carolina. Although the original complaint filed in this action was predicated on the negligence, carelessness, gross negligence, willfullness and wantonness of the defendant, by the amended complaint the action is based solely on the negligence of the defendant, (R. pp. 3-7).

The amended complaint alleges that the defendant and plaintiff are employer and employee, respectively, under the provisions of the South Carolina Workmen's Compensation Act, and would be bound by such provisions relating to payment and compensation for personal injury or death by accident arising out of and in the course of employment

except for the notice of non acceptance of the provisions of the Act given by the defendant at least thirty days prior to the date of the alleged injury in accordance with the provisions of the said act, (R. pp. 25-26).

The defendant filed its answer to the said complaint alleging as a second defense thereof that the plaintiff was guilty of contributory recklessness and wantonness which proximately caused the plaintiff's injury.

The plaintiff thereafter seasonably moved to strike the defense of contributory recklessness and wantonness from the answer on the ground that contributory recklessness and wantonness is a degree of contributory negligence and therefore such defense is not available as a defense to the defendant in the instant action in accordance with the provision of section 7035-17, Code of Laws of South Carolina, 1942, the pertinent portion of which provides that "an employer who elects not to operate under this article shall not in any suit at law instituted by an employee subject to this article to recover damages for personal injury or death by accident, be permitted to defend any such suit at law upon any or all of the following grounds,

(a) That the employee was negligent."

The motion was resisted by the defendant and after a full hearing the District Court Judge granted the motion, (R. pp. 10-13).

The case was thereafter tried and the jury rendered a verdict in favor of the plaintiff for $5,000.00, and judgment was duly entered thereupon. The defendant appealed to the Circuit Court of Appeals for the Fourth Circuit from the judgment of the District Court on the sole ground that the District Judge was in error in granting the plaintiff's motion to strike the defense of contributory recklessness

and wantonness attempted to be set up in the defendant's answer.

The Circuit Court of Appeals affirmed the District Court and dismissed the appeal, (R. pp. 18-21).

QUESTIONS INVOLVED

The questions presented to this Court by the Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit are as follows:

A.

Did the Circuit Court of Appeals decide an important question of local law in a way probably in conflict with applicable local decisions?

B.

Did the Circuit Court of Appeals fail to decide a federal question which has not been, but should be, settled by the United States Supreme Court?

C.

Did the Circuit Court of Appeals so far depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision?

D.

Did the Petitioner comply with Paragraph 1 of Rule 12 of the rules of this Court in presenting the petition for a writ of certiorari?

ARGUMENT

Point A

The decision of the Circuit Court of Appeals does not involve an important question of local law, nor has the Court decided the question in a way probably in conflict with local applicable decisions.

It is well settled that unless a question of gravity and importance is herein involved this Court will not require a case to be certified for review and determination. *Ex parte Woods,* 143 U. S. 202; Rule 38, Paragraph 5, of Rules of the Supreme Court of the United States; nor will this Court assume jurisdiction merely to give the defeated party in the Circuit Court of Appeals another hearing, *Magnum Import Co. v. Houbigant, Inc.* 262 U. S. 159.

We respectfully submit that the interpretation of the statute of South Carolina, Section 7035-17, Code of Laws of South Carolina for 1942 (R. pp. 28-29), by the District Court and the Circuit Court of Appeals holding that the defendant may not be permitted to defend the instant suit at law upon the ground that the employee (respondent herein) was guilty of contributory recklessness and wantonness, does not fall within the category of questions of such gravity and general importance as to require the review of the conclusion of the Circuit Court of Appeals in reference to it.

Of course the question decided by the Court is important to the petitioner himself and involves cases wherein an employer elects not to operate under the Workmen's Compensation Act of South Carolina, but nevertheless the question was decided by the District Court and the Circuit Court of Appeals in accordance with the wording and intention of the Legislature and does not rise to that degree of importance wherein this Court should certify the question for review. Although the petitioner has the burden of proving the jurisdiction of this Court to grant certiorari it is noted that the petitioner has failed to point out either in its petition or the supporting brief how or in what manner the question decided by the Circuit Court of Appeals is an important one of local law.

Conceding, however, for the purpose of argument, that the question decided by the Circuit Court of Appeals may be an important one of local law, it is clear from the decisions of the District Court and the Circuit Court of Appeals that the question was decided in accordance with applicable local decisions. Thus, in the case of *Thornhill v. Davis,* 121 S. C. 49, decided by the Supreme Court of South Carolina, a very analogous situation to that of the instant case is presented. In that case the plaintiff brought an action against the defendant under the Federal Employers' Act under which contributory negligence is not a bar to the plaintiff's cause of action but could be set up by the defendant to the extent only of minimizing damages. The defendant in that case, like the petitioner in the instant case in the District Court below, sought to set up the plea of contributory recklessness or willfullness as a complete defense under the Federal Employers' Act, the defendant's position being that while the defense of contributory negligence merely operated in mitigation of damages, the defense of contributory recklessness or willfullness operates as a bar to the action. The Supreme Court of South Carolina in treating contributory recklessness and willfullness as a degree of contributory negligence and therefore holding that contributory recklessness or willfullness does not bar recovery, but operates to the same extent as contributory negligence, stated as follows:

> "Contributory negligence as a defense is applicable to an action under the federal statute to the extent, but to the extent only, of operating to minimize the damages in case the jury should find that the injured party was guilty of contributory negligence in the particulars alleged in the answer. The appellant contends that this rule does not apply in the present case, for the reason that the testimony established, not merely **contributory negligence** on the part of the plain-

tiff's intestate, but established **contributory recklessness and willfullness.** * * *" (Emphasis added.)

"The assignments of error under the seventh, eighth, thirteenth, and seventeenth assignments are * * * that the trial judge erred in failing to charge the jury that the plea of 'contributory recklessness or willfullness' was a complete defense under the Federal Employers' Liability Act—that is to say, that while the defense of contributory negligence merely operates in mitigation of damages, on the other hand contributory recklessness or willfullness operates as a bar to the action when established by competent testimony."

In dealing with such contention of the defendant the opinion continues:

"While it is not essential to our conclusion upon the exceptions raised relating to this matter, it may be remarked that Congress in limiting the force and effect of contributory negligence in an action of this character had in mind the changing of the application of the rule of evidence in such cases. Instead of such evidence operating to defeat the right of action entirely, after the passage of the act, in cases brought under the act, such evidence operates only to reduction of the damages which the plaintiff would otherwise, in the absence of such contributing cause, be entitled to receive. Under this rule of law, **the matter of contributory negligence and the degree thereof, if any, becomes one for the jury to consider in determining the amount of damages which should be awarded in case it should be found that any damages were recoverable.** (Emphasis added.) The reduction in amount then would vary with the **degree of negligence** operating as a contributing proximate cause to the injury by the injured party—if slight, the jury would be warranted in making a slight reduction in the amount which it would have otherwise awarded; if great, it would be warranted in making an entirely different estimate of the amount to which the damages should be reduced. The allega-

> tions of the **degrees of negligence** and the proof thereof are matters then to be considered by the jury in reaching its conclusion as to the amount to be awarded after having concluded that a case of liability has been established." (Emphasis added.)

In the case at bar the facts although not identical are very similar and analogous to the facts in the above-cited case; the only difference being that under the Federal Employers' Act contributory negligence is a defense only to the extent of minimizing plaintiff's damage, whereas, under the South Carolina Workmen's Compensation Act contributory negligence is not a defense to any extent. Since the South Carolina Supreme Court in the *Thornhill case* treated contributory recklessness and willfullness in the same manner as contributory negligence the decision of the Circuit Court of Appeals logically and reasonably followed in accordance with the reasoning of the *Thornhill case* that a different meaning should not be given to contributory recklessness or wantonness under the South Carolina Workmen's Compensation Act in the case *sub judice*, and that contributory recklessness and wantonness is a degree of contributory negligence and should not therefore be permitted as a defense to the plaintiff's cause of action.

The decision of the Circuit Court of Appeals is also supported by the case of *Templeton v. Charleston & W. C. Ry. Co.*, 117 S. C. 44. Dealing with the question of gross negligence as applied to the Employers' Liability Act, the South Carolina Supreme Court said therein:

> "The second objection to the charge is alleged error in stating that the plaintiff would be entitled to recover although his negligence was gross, and that of the defendant slight. We find nothing in the act, and the appellant has cited no authority, which would indicate error in this proposition. While the statute makes **no distinction between degrees of negligence** it

certainly does not debar plaintiff from all recovery in case his contributory negligence should be gross, and it certainly contemplates the possibility of the negligence of one being greater than that of the other." (Emphasis added.)

Under Section 7035-17, Code of Laws of South Carolina for 1942, the defendant, in an action by plaintiff, both of whom are employer and employee within the meaning of the Act, is not permitted to allege as a defense that the defendant was contributorily negligent in cases where a defendant does not elect to operate under the said Act. It follows, therefore, that since the defendant cannot allege contributory negligence he should not be permitted to allege any of the degrees thereof such as contributory recklessness or wantonness, otherwise the provisions of Section 7035-17 of the South Carolina Workmen's Compensation Act would be circumvented.

To permit the defendant to allege contributory recklessness or contributory wantonness would in effect be permitting him to allege that the plaintiff was contributorily negligent which is a degree of negligence and which must necessarily include contributory negligence. It is apparent that this would be contrary to the clear intent of the provision of the South Carolina Workmen's Compensation Act.

Petitioner contends that there is a marked difference between contributory negligence and contributory recklessness and wantonness, and in support of its contention cites in the petition a number of cases decided by the South Carolina Supreme Court and in its brief quotes a number of excerpts of such cases. As stated by the South Carolina Supreme Court in the case of *City of Anderson v. Fant*, 96 S. C. 5, "The language of an opinion must always be read and construed in the light of the facts of the case

under consideration," and when so read it will clearly appear that the quoted excerpts do not bear the interpretation placed upon them by petitioner. We have carefully examined the cases cited in the brief by petitioner and it will be noted that these cases deal generally with the question of punitive damages which under the law of South Carolina are allowable in a negligence case where a defendant is guilty of negligence so gross or reckless of consequences as to imply or assume the nature of wantonness, willfullness or recklessness. We agree that there may be some difference between negligence, recklessness and wantonness, but the difference is only in degree and not in kind. Our contention on this point is clearly supported by the language of the then Chief Justice of the South Carolina Supreme Court in the case of *Bell v. Atlantic Coast Line Railroad Company*, 202 S. C. 160, wherein he states as follows:

> "In the case of *Sample v. Gulf Refining Co.*, 183 S. C. 399, 191 S. C. 209, this Court said on page 411 of the State Reports 183 S. C., 191 S. E., on page 214: 'While punitive damages are recoverable for **negligence so gross or reckless of consequences as to imply or to assume the nature of wantonness, willfullness, or recklessness,** yet they are not awarded in this state for mere gross negligence. *Watts v. South Bound R. Co.*, 60 S. C., 67, 38 S. E., 240; *Proctor v. Southern Ry Co.*, 61 S. C., 170, 39 S. E. 351; *Boyd v. Blue Ridge R. Co.*, 65 S. C., 326, 43 S. E., 817; *Webb v. Atlantic Coast Line R. Co.*, 76 S. C., 193, 56 S. E., 954, 9 L. R. A. S., 1218, 11 Ann. Cas., 834'." (Emphasis added.)

Also in the case of *Baxley v. Atlantic Coast Line R. Co.*, 193 S. C., 429, wherein it was held that contributory gross negligence is a defense to an action based on gross negligence, recklessness and wantonness, the following language of the court makes it apparent that recklessness and wantonness is nothing more than a degree of negligence:

"The failure to do so amounts to negligence and contributory negligence of such gross nature as to bar recovery."

In the case of *Cook v. Atlantic Coast Line R. Co.*, 183 S. C., 279, it was held that exemplary damages which must be based upon recklessness or wantonness "do not and cannot exist as an independent cause of action, but such damages are mere incidents to the cause of action and can never constitute the basis thereof. If the injured person has no cause of action independent of a supposed right to recover exemplary damages, then he has no cause of action at all." Thus it clearly appears that where negligence, recklessness and wantonness are alleged they are not two independent causes of action.

As stated by the Circuit Court of Appeals "there is nothing" in the cases cited by the petitioner "to justify a holding that reckless and wanton conduct does not fall within the negligence of the employee which the statute forbids the employer to assert as a defense, where the clear purpose of the statute is to make the negligence of the (fols. 22-23), employer the sole test of his liability." The Circuit Court of Appeals also predicated its decision on the case of *Tiller v. A. C. L. R. Co.*, 318 U. S., 54, 58, decided by this Court. The plaintiff in that case brought an action under the Federal Employers' Liability Act to recover damages for the death of plaintiff's intestate, an employee of the defendant, by reason of the negligent operation of a car and failure of the defendant to provide a reasonably safe place to work. The defendant denied negligence on its part and pleaded contributory negligence on the part of the plaintiff's intestate, and also set up as a separate defense the assumption of risk. The United States Supreme Court in holding that an employee under the Employers' Liability Act cannot be charged with the assumption of risk under another name had this to say:

"We find it unnecessary to consider whether there is any merit in such a conceptual distinction between aspects of assumption of risk which seem functionally so identical, and hence we need not pause over the cases cited by the court below, all decided before the 1938 amendment, which treat assumption of risk sometimes as a defense to negligence, sometimes as the equivalent of non-negligence. We hold that every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 amendment, and that Congress, by abolishing the defense of assumption of risk in that statute, did not mean to leave open the identical defense for the master by changing its name to 'non-negligence'. As this Court said in facing the hazy margin between negligence and assumption of risk as involved in the Safety Act of (March 2), 1893, 45 U. S. C. A., Sec. 1, 'Unless great care be taken, the servant's rights will be sacrificed by simply charging him with assumption of the risk under another name;' and no such result can be permitted here."

As was so aptly stated by the Honorable George Bell Timmerman, United States District Judge, in granting the plaintiff's motion to strike the defense in question:

"The reasoning of the Supreme Court in the *Tiller case* is applicable here. An employer should not be permitted to circumvent the General Assembly's clear intention to abolish the defense of contributory negligence in cases of this character by merely calling a defense contributory recklessness or contributory wantonness and thereby retain the advantages of practically all the testimony that might be introduced in a common-law action based on negligence where the plea of contributory negligence is interposed."

The decisions of the South Carolina Supreme Court in dealing with the philosophy of the Workmen's Compensation Act and the interpretation of same have repeatedly held that the Act should be construed favorably in favor

of employees and their dependents in furtherance of the beneficent purpose for which it was enacted and to avoid incongruous or harsh results. Following the reasoning of this principle of law to its logical conclusion makes it clear that if the defendant in the instant case were permitted to set up the defense of contributory recklessness and wantonness it would be opening the door to the introduction of the defense of contributory negligence, contrary to the clear intent and purpose of our legislature in enacting the provisions of Section 7035-17 of the Code of Laws of South Carolina, 1942, which would lead to harsh and incongruous results. On this point the South Carolina Supreme Court in the case of *Cokely v. Robert Lee, Inc.*, 197 S. C., 159, had this to say:

> "Compensation laws constitute a form of social legislation and were enacted primarily for the benefit, protection and welfare of working men and their dependents, to relieve them of the uncertainties of a trial in a suit for damages, to cast upon the industry in which they are employed a share of the burden resulting from industrial accidents, and to prevent the burden of injured employees and their dependents becoming charges on society. Their right to sue and obtain compensation is taken away, and such laws should be construed liberally in favor of the employees and their dependents, in furtherance of the beneficent purposes for which they were enacted, and to avoid any incongruous or harsh results. *Phillips v. Dixie Stores, Supra; Rudd v. Fairforest Finishing Company, supra; Layton v. Hammond-Brown-Jennings Company, supra; Bannister v. Shepherd, supra; Ham v. Mullins Lumber Company, supra; Marchbanks v. Duke Power Company*, 190 S. C., 336, 2 S. E., (2d), 825; *Patterson v. Courtenay Mfg. Company*, S. C. 14 S. E. (2d), 16, decided April 2, 1941."

It further appears from an examination of the decision of the Circuit Court of Appeals that the facts upon

which the petitioner relied, as indicated by the pleadings and statements at the bar of the Circuit Court clarifying the stipulation, amounted to nothing more than contributory negligence, the nature of which was not changed by calling it contributory recklessness and wantonness. It also appeared to the satisfaction of the Circuit Court of Appeals that if there was any error as a result of the ruling of the District Court the petitioner did not suffer prejudice as the result of such ruling.

For the reasons aforementioned under this heading we respectfully submit that the petition for the writ of certiorari to the Circuit Court of Appeals should be denied.

Point B

The Circuit Court of Appeals did not fail to decide a federal question which should be settled by the United States Supreme Court.

Although petitioner attempts to raise the federal question that the construction of the aforementioned provision of the South Carolina Statute constitutes a taking of petitioner's property without due process of law in violation of the United States Constitution, we respectfully submit that the constitutional point is a mere pretext put forward in order to open other questions that otherwise would not come here. This pretext should not be allowed to succeed. We respectfully contend that this Court should not deal with an attempt by petitioner to obtain a reversal of the decision of the Circuit Court upon a construction of the South Carolina Statute, not so manifestly absurd as to include the defense of contributory recklessness and wantonness where the statute makes no distinction between degrees or kinds of negligence. The case of *United Surety Company v. American Fruit Products Company*, 238 U. S., 140, is precisely

in point and conclusive against the jurisdiction with reference to petitioner's contention.

We also submit that an alleged erroneous construction of a State statute by the State Court is binding upon the United States Supreme Court, *Greenough v. Tax Assessor of Newport*, 331 U. S., 486, and is not a denial of due process guaranteed by the 14th Amendment so as to be reviewable by this Court, *Neblett v. Carpenter*, 305 U. S., 297. Where the jurisdiction of a Federal Court is based upon diversity of citizenship, as in the instant case, such Court is, in effect, only another Court of the state, *Angel v. Bullington*, 330 U. S., 183, and it, therefore, follows that the construction of the aforementioned South Carolina Statute by the District Court sitting in South Carolina does not amount to a denial of due process of law so as to be reviewable by this Court.

In accordance with the facts and the law applicable thereto we respectfully submit that the petition for writ of certiorari on the ground that the Circuit Court of Appeals failed to decide a federal question which has not been, and should be, settled by the United States Supreme Court, should be denied.

Point C

The Circuit Court of Appeals did not depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The petitioner states that the Circuit Court of Appeals so far departed from the accepted and usual course of judicial proceedings because as stated by petitioner at page 8 of the petition for writ of certiorari "that the Circuit Court of Appeals should have granted full force and effect to said stipulation and should not have endeavored to pass

on the question involved merely from the pleadings and undisclosed statements at the Bar of the Court.

We are at a loss to understand counsel's position on this point. The argument or contention of the petitioner that the Court cannot consider the pleadings and the statements at the Bar of the Court made during oral argument together with the other portions of the record, in order to clarify the stipulation of counsel and determine the question before, is clearly specious. The statements referred to by the Circuit Court of Appeals are statements of counsel for petitioner. A careful perusal of the Circuit Court's opinion will clearly indicate that the Court referred to the pleadings and statements of petitioner's counsel, and for the petitioner to now state that the Court did not refer to the statements of counsel for petitioner is unfair and an attempt to invoke the jurisdiction of this Court without any basis either in law or in fact.

Counsel for petitioner take great comfort in the stipulation referred to in his brief at page 29. May we point out, in order to clarify our position with reference to this stipulation, that the theory of the plaintiff's case was that the defendant was negligent, which negligence on the part of the defendant proximately caused plaintiff's injuries. The case was not tried on the theory that plaintiff was entitled to a recovery merely because contributory recklessness and wantonness on the part of the defendant was not a proper defense. The defendant was not deprived of its right to defend or present any testimony in its behalf with reference to the non-negligence of the defendant or to show non-liability on its part; the only effect of the District Judge's ruling being that the defendant could not defend on the ground of contributory recklessness and wantonness of the plaintiff. It is undisputed that the sole question involved in

the appeal to the Circuit Court was whether or not the Trial Judge was in error in ruling that the defendant was not permitted to interpose the defense of contributory recklessness and wantonness under the construction of Section 7035-17 (Workmen's Compensation Act) of the Code of Laws of South Carolina for 1942.

We are not unmindful of the provision of Section 7035-15, Code of Laws of South Carolina, 1942, which provides that compensation shall not be payable for injury or death if caused by the intoxication of an employee or by the willful intention of the employee to injure or kill himself or another. It is undisputed that counsel for the appellants in their answer did not attempt to set up this defense but simply sought to interpose the defense of contributory recklessness and wantonness as distinguished from willful intentional injury by the employee himself. If the appellant had sought to avail himself of the defense of willful intentional injury on the part of the plaintiff as distinguished from contributory recklessness and wantonness he could have done so in his answer, and obviously this was not done, since such defense was neither set up in the answer nor any point with reference to such defense was made in the instant appeal.

For the reasons aforesaid we respectfully urge that the proceedings before the Circuit Court of Appeals were entirely in accordance with the accepted and usual course of Judicial proceedings and do not warrant an exercise of this Court's power of supervision.

Point D

The Petitioners failed to comply with Paragraph 1 of Rule 12 of the rules of the Supreme Court of the United States in presenting the petition for writ of certiorari, and the petition should, therefore, be denied.

The respondent contends that the appellant has failed to show and prove the basis upon which it is contended that this Court has jurisdiction to review the judgment in question. A careful perusal of the petition clearly fails to include a statementof the grounds upon which it is contended that the questions involved are substantial in accordance with paragraph 1 of Rule 12 of this Court. The case precisely in point is *McArthur v. United States*, 315 U. S., 787.

CONCLUSION

A careful perusal of the petition for writ of certiorari and supporting brief of the petitioner and the transcript of record makes it apparent that the Circuit Court of Appeals did not decide an important question of local law in a way probably in conflict with applicable local decisions; that the contention of the petitioner that this case presents a federal question which has not been decided by the Circuit Court of Appeals is wholly without merit; that the Circuit Court of Appeals acted in accordance with the accepted and usual course of judicial proceedings; and that the petitioner failed to comply with paragraph 1 of Rule 12 of the Rules of this Court in failing to include in its petition the statement of the ground upon which it is contended that the questions involved are substantial. In view of these facts and in accordance with the law applicable thereto and the rules of the United States Supreme Court we respectfully submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

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